

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

ICS CYBERNETICS, INC.

CASE NO. 88-00478

Debtor

Chapter 11

APPEARANCES:

GRASS, BALANOFF & WHITELAW, P.C.
Attorneys for Debtor
247 W. Fayette Street
Syracuse, New York 13202

MICHAEL BALANOFF, ESQ.
Of Counsel

HODGSON, RUSS, ANDREWS, WOODS
& GOODYEAR, ESQS.
Attorneys for Creditors Committee
1800 One M & T Plaza
Buffalo, New York 14203-2391

DOUGLAS EDWARDS, ESQ.
Of Counsel

MICHAEL COLLINS, ESQ.
Office of the U.S. Trustee
10 Broad Street
Utica, New York 13501

JAMES HASSETT
Court Appointed Manager
c/o CIS Corp.
One Northern Concourse
P.O. Box 4785
Syracuse, New York 13221-4785

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court considers the Application of James P. Hassett ("Hassett"), the Court Appointed Manager in this Chapter 11 case, seeking so-called "fee enhancements" totalling \$210,000 for three of the professionals previously appointed by the Court. The three professionals are identified as: Grass, Balanoff and Whitelaw, P.C. ("Grass"), Debtor's counsel, which seeks an additional

\$90,000; Hodgson, Russ, Andrews, Woods & Goodyear, Esqs. ("Hodgson Russ"), counsel to the Unsecured Creditors Committee, which seeks an additional \$65,000; and Hassett as Disbursing Agent and Court Appointed Manager of the Debtor, who seeks an additional \$55,000.¹

The Hassett Application was heard by this Court at a motion term held in Syracuse, New York on February 21, 1995. The only opposition to the fee enhancements was interposed by the United States Trustee ("UST") and that opposition was directed primarily at the requests of Hodgson Russ and Hassett.²

The Court, after hearing argument, reserved on the Application and invited the parties to file memoranda of law. The contested matter was submitted for decision on February 28, 1995.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of this contested matter pursuant to 28 U.S.C. §§1334(b), 157(a), (b)(1) and (2)(A).

FACTS

Debtor initially filed its voluntary petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code") on

¹ Hodgson Russ did not individually seek an enhancement, allegedly because they were unable to convene a meeting of the Unsecured Creditors Committee prior to the return date of this Application. However, Hassett purports to make the Application on Hodgson Russ' behalf.

² Both Electronic Data Systems (EDS) and Citibank, two of the Debtor's largest creditors appeared in support of the fee enhancements.

March 31, 1988. Debtor had been engaged in the business of leasing computer equipment prior to its filing and continued in that business for a significant period subsequent to its filing.

Debtor's Amended Plan of Reorganization ("Plan") was confirmed by this Court pursuant to an Order dated August 10, 1992. In the course of the Chapter 11 case, creditors have received a distribution of approximately \$95 million including a dividend of between 69-71% to unsecured creditors, making the case one of the most successful Chapter 11 cases ever filed in this Court.

To date, administrative expenses, comprised solely of professional fees, have been approved in the sum of approximately \$1,700,000 to include \$435,353.33 paid to Grass, \$347,823.65 paid to Hassett and \$598,732.63 paid to Hodgson Russ. Approval of the fee enhancements sought herein would cause the professional fees to approximate 2% of the total monies disbursed.³

ARGUMENTS

The UST asserts that while fee enhancements are neither specifically allowed or prohibited by the Code, they should be awarded only in "rare" and "exceptional" cases. The mere fact that a case has been successful should not provide an independent ground for enhancing professional fees. The UST opines that the standard is that the services rendered are superior to that which one should reasonably expect in light of the hourly rate being charged and

³ The total fees referenced herein are taken from the case docket and appear to differ somewhat from the totals set forth in the Hassett Application.

that the success of the case was exceptional.

Specifically, the UST does not object to the Grass enhancement in principle, but opposes it both as to the amount and the lack of a basis for arriving at that amount. In the case of Hodgson Russ and Hassett, the UST objects to any enhancement because neither professional has identified a basis for such an award.

Grass responds to the UST, and while not disputing the enhancement standard asserted by the UST, points out that the Court must distinguish between a successful result that flowed naturally from the circumstances of the case and success that was literally snatched from the jaws of utter failure. Grass asserts that this case was of the latter category. Grass references most significantly the total abandonment of the Debtor by its pre-petition management personnel, the flurry of computer lease rejection motions early on, the withholding of payment by those lessees that did not seek to reject their leases, the acknowledgment by both EDS and Citibank, two of the largest creditors, that they initially evaluated the Chapter 11 as a "no asset" case and the constant onslaught of litigation that plagued the Debtor from the inception of the case until very recently.

Grass argues that had it not been for Hassett's "outstanding business acumen" Debtor would never have survived post-petition. It also points out that in the seven years Hassett served as the Court appointed manager of Debtor, he never sought an increase in his hourly rate of \$150.00.

Responding to the UST's assertion that no basis for the

percentage of enhancement is articulated, Grass contends that it purposely did not bill the estate for approximately 200 hours of interoffice conferences which were useful to the case because it was unclear whether the estate could bear the additional expense at the time the conferences were held. As to the enhancement sought by Hodgson Russ, Grass opines that its assistance in connection with the many complex legal issues that arose throughout the case was invaluable.

Finally, Grass argues that in all of the cases relied upon by the UST in objecting to the fee enhancements, at least one creditor opposed the request, while here none of the creditors opposed the fee enhancements; in fact, two of the major creditors supported them, and hint that the UST's lack of involvement in the case renders the substance of its opposition suspect.

Hodgson Russ argues that the UST's apparent premise that creditors are entitled to expect success in the typical Chapter 11 case, and, thus, the case professionals are not entitled to a fee enhancement when success occurs, is flawed. Hodgson Russ, without the benefit of any statistical data, opines that in the typical Chapter 11 liquidation or Chapter 11 turned Chapter 7 liquidation, unsecured creditors typically receive a minimal percentage dividend.

Hodgson Russ, like Grass, points to the chaotic state of affairs that existed post-petition with regard to the Debtor's lack of management and the threat that it posed to any orderly liquidation of assets, as well as the myriad of novel legal issues that were spawned as a result of Debtor's far flung computer

leasing schemes.⁴ Hodgson Russ asserts that it was actively involved in all of the litigation undertaken in this case, either as lead counsel or in a supporting role. It also emphasizes the high percentage of return to the approximately \$15 million of unsecured debt.

DISCUSSION

The UST relies upon the relatively recent decision of the Seventh Circuit Court of Appeals in Matter of UNR Indust. Inc., 986 F.2d 207 (7th Cir. 1993) for its qualified consent to a fee enhancement for Grass while opposing any such enhancement for Hassett or Hodgson Russ.

The rationale of the UST, which appears to be supported by UNR Industries, is that since Grass' hourly rate approximated only \$170 for the exceptional services it rendered to Debtor, it is entitled to an enhancement. Conversely, Hassett, whose hourly rate was \$150, was fairly compensated for his services, even if one concedes that those services were of extraordinarily high quality. As to Hodgson Russ, the UST simply contends that the Court is without a sufficient basis to even analyze its request for a fee enhancement.

⁴ On April 20, 1988, less than three weeks into the case, creditor EDS filed an omnibus motion which sought inter alia sequestration and segregation of cash collateral, an accounting, a determination of whether certain leases had been terminated pre-petition. and modification of the stay. Before the first anniversary of its filing, Debtor was involved in no less than twenty-six different contested matters involving Code §365 motions to compel assumption or rejection of various computer leases.

The Seventh Circuit essentially summarized its view on fee enhancement when it concluded that "(Debtor's Attorney) fails to persuade us that these awards - which essentially represent the lodestar fee - do not fairly compensate for the work done or that they fall short of the compensation earned by attorneys providing comparable work outside of the context of bankruptcy." Id. at 211.

The Applicants herein apparently view fee enhancements in a different light than did the Seventh Circuit. They appear to argue that fair compensation or lack thereof should not determine eligibility for a fee enhancement, but rather a fee enhancement is purely and simply a reward for exceptional results having no relevance to whether or not the professional has already been fairly compensated on an hourly basis.

The Applicants rely upon the rationale of the Eighth Circuit Court of Appeals in In re Apex Oil Co., 960 F.2d 728 (8th Cir. 1992). The Eighth Circuit reversed the district court which in turn had overturned a fee enhancement awarded by the bankruptcy court. The Circuit Court determined, contrary to the conclusions of the district court, that "Because the lodestar amount may already compensate the applicant for exceptionally good service and results, however, the fee applicant must do more than establish outstanding service and results. The applicant also must establish that the quality of service rendered and the results obtained were superior to what one reasonably should expect in light of the hourly rates charged and the number of hours expended." Id. at 732. The district court, in reversing the award of the bankruptcy court, had concluded that the "quality of representation and

results obtained by themselves, can never constitute rare and exceptional circumstances because these factors are presumptively reflected in the number of hours billed on the hourly rate." Id. at 731.

Significantly, the Eighth Circuit rejected the notion apparently later adopted by the Seventh Circuit in UNR Industries, supra, that a bankruptcy court may only award an enhancement where the "enhancement is necessary to make the award commensurate with compensation for comparable, non-bankruptcy services." Id. at 732.

Having reached its conclusion of law, however, the Eighth Circuit remanded the case to the bankruptcy court because it found that the bankruptcy court did not address why the professional's services and results obtained were not adequately compensated by simply adopting the lodestar approach.

In the instant contested matter, the UST concedes that as to the Grass request, it has "overcome the presumption against a fee enhancement." (See Objection of UST, dated February 17, 1995 ¶ 7). The UST concludes that Grass' hourly rate could be reasonably enhanced to \$195.50 per hour resulting in an overall 15% fee enhancement. Conversely, the UST asserts that Hassett has been adequately compensated at \$150 per hour and that with regard to Hodgson Russ, no grounds for an enhancement have been asserted; thus, none should be awarded.

While the Court believes that the UST's analysis of the Grass fee enhancement is conceptually appropriate and adopts the view of the Eighth Circuit in Apex Oil, it cannot agree that Hassett and Hodgson Russ should be denied an enhancement. To do so

would constitute an arbitrary and capricious approach by this Court, which unfairly discriminates against the latter professionals.

The Court believes that the success of this Chapter 11 case was due to the unique combination of all three professionals who seek enhancements. Grass and Hodgson Russ combined their skills to guide the Debtor through the legal maze which plagued the case from its very inception, while Hassett's expertise in the world of computer leasing and corporate management enabled the Debtor to survive in spite of the abrupt departure of its pre-petition chief executive officer and management team. To conclude that one of these professionals should have its fee enhanced while the other two should not on the basis that they have already been adequately compensated would be truly unfair.

It is difficult for this Court to arrive at a method of quantifying the appropriate enhancement. All three professionals billed their time at differing hourly rates. Hassett's time records indicate that he did not deviate from an hourly rate of \$150 per hour throughout the duration of the case. Grass and Hodgson Russ fee applications indicate that a "blended" hourly rate was utilized in light of the various individuals in each firm, working on the case. Grass' blended hourly rate from 1988 to 1995, appears to approximate \$123 per hour while Hodgson Russ approximates \$115 per hour.⁵

No plausible explanation is provided by any of the

⁵ The UST, in its Objection, alleges that Grass' hourly rate was \$170 per hour, but no explanation was provided as to how that calculation was arrived at.

professionals as to how they arrived at the various lump sum enhancements. It would appear that Hassett first arrived at an amount of total fee enhancement and then allocated a specific percentage to each professional. It appears that the total enhancement was intended to bring all of the administrative expenses to an amount approximating not more than 2% of the \$95,000,000 distributed to all creditors. Conversely, the UST's Objection, insofar as it objects to actual enhancement amounts, is not persuasive.

While it is the independent duty of a bankruptcy court to analyze professional compensation in the absence of any creditor objection, (In re S.T.N. Enterprises, Inc., 70 B.R. 823, 831 (Bankr. D.Vt. 1987)), it is not incumbent upon a bankruptcy court to modify the requested compensation in whole or in part simply because it has conducted such an analysis. Clearly, this was a unique case which travelled the winding road of Chapter 11 for more than seven years, to a conclusion that was successful beyond all reasonable expectations. At times, it literally engulfed not only the professionals, but the Court as well. The creditors fared far better than apparently any of them ever imagined. Several have wholeheartedly endorsed the fee enhancement.⁶ Only the UST, fulfilling as he must his statutory duties, has objected and that is at best an objection in principle only since the UST has for the most part been a distant observer throughout the duration of the

⁶ The Court is in receipt of correspondence from two unsecured creditors, Econocom-USA Inc. and Charterhouse Equipment Associates, indicating their support for the fee enhancements sought.

case. Additionally, his position would not appear to be supported, at least by those members of the creditor body who were interested enough to voice their support for the enhancements.

Based upon all of the foregoing, the Court will approve the fee enhancements as requested in the Hassett Application.

IT IS SO ORDERED.

Dated at Utica, New York

this day of

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge